STATE OF MICHIGAN

COURT OF APPEALS

HAYES EXCAVATING, INC.,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

SKYLINE DEVELOPMENT & CONSTRUCTION CO. and ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Defendants/Counterplaintiffs-Appellees/Cross-Appellants.

UNPUBLISHED
January 4, 2005

No. 247274
Macomb Circuit Court
LC No. 2000-002487-CZ

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Skyline Development and Construction Co. (Skyline) served as a general contractor on a project at Selfridge Air National Guard Base. St. Paul Fire & Marine Insurance Company (St. Paul) issued a payment bond to Skyline on that project. Skyline hired Hayes Excavating, Inc. (Hayes) as a subcontractor to dispose of contaminated material for which Skyline agreed to pay "$16.50 per cubic yard." Skyline and Hayes later disagreed on the meaning of "cubic yard," prompting Hayes to file a breach of contract claim against Skyline and a claim against St. Paul as the surety. The trial court granted summary disposition of Hayes' claim against St. Paul pursuant to MCR 2.116(C)(10). Hayes' claim against Skyline proceeded to a bench trial, following which the trial court awarded Hayes $35,248.87 in damages, plus interest, costs, and mediation sanctions for a total judgment of $55,969.81. Hayes appeals as of right the trial court's order granting summary disposition to St. Paul. Skyline cross-appeals the trial court's order of judgment. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Judgment Against Skyline

We review the trial court's findings of fact in a bench trial for clear error. We review de novo the trial court's conclusions of law. MCR 2.613(C); *Walters v Snyder,* 239 Mich App 453, 456; 608 NW2d 97 (2000).

A. Accord and Satisfaction

Skyline first contends that the trial court erroneously determined that Hayes' breach of contract claim was not precluded by accord and satisfaction. In support of this argument, Skyline relies on two letters and a check that it sent to Hayes. In its first letter, dated March 6, 2000, Skyline asked Hayes to review Skyline's calculation of the amount owed and stated, "With your consent we will issue payment Tuesday March 7, 2000." In its second letter, dated March 10, 2000, Skyline noted that Hayes had not responded its first letter, and indicated that a check was enclosed for the amount due, according to Skyline's calculations. The letter further stated, "Based on receipt of this payment Skyline considers this issue resolved, and no further money is owed to Hayes Excavating Co." The check did not indicate "payment in full" or include similar notation.

We agree with the trial court that the evidence does not support the finding of an accord and satisfaction. Although Skyline conveyed its position on the disputed amount, the statements were not "so clear, unequivocal, and unambiguous that they fully informed plaintiff that its claim would be satisfied upon negotiating the check." *Nationwide Mutual Ins Co v Quality Builders, Inc*, 192 Mich App 643, 649; 482 NW2d 474 (1992). "'The tender of a sum less than the contract price, in settlement of a disputed claim, must be accompanied with a statement, not which *may* be understood by the creditor as intended to be in full settlement and satisfaction of the claim, but which *must* be so understood by him.'" *Id*. (citation omitted).

B. Contract Construction

Skyline also contends that the trial court should have construed the contract against Hayes, the drafter and should not have considered extrinsic evidence.

With regard to construing the contract against the drafter, our Supreme Court has explained that this rule is to be used only where the parties' intent cannot be determined by other means:

> In interpreting a contract whose language is ambiguous, the jury should also consider that ambiguities are to be construed against the drafter of the contract. This is known as the rule of contra proferentem. However, this rule is only to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean. Accordingly, if the extrinsic evidence indicates that the parties intended their contract to have a particular meaning, this is the meaning that should be given to the contract, regardless of whether this meaning is in accord with the drafter's or the nondrafter's view of the contract. [*Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-471; 663 NW2d 447 (2003) (citations and footnotes omitted).]

The trial court did not err in considering extrinsic evidence to determine the parties' intent because the trial court first determined that the language at issue was ambiguous (a determination Skyline does not challenge). The meaning of an ambiguous contract is a question

for the finder of fact. *Klapp, supra* at 469. To determine the parties' intent where the contract is ambiguous, the finder of fact may consider relevant extrinsic evidence. *Id*. "Looking at relevant extrinsic evidence to aid in the interpretation of a contract whose language is ambiguous does not violate the parol evidence rule." *Id*. at 470. Therefore, Skyline's argument is without merit.[1]

II. Summary Disposition of Plaintiff's Claim Against St. Paul

Hayes contends that the trial court erroneously granted summary disposition to St. Paul pursuant to MCR 2.116(C)(10). "This Court reviews the grant or denial of summary disposition do novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The trial court dismissed Hayes' claim against St. Paul because Hayes failed to produce evidence or cite statutes supporting its allegation that it was a bond claimant. But our review of the record indicates that defendants did not contest, but rather, *admitted* that St. Paul was a surety for Skyline on the Selfridge project. In their motion for summary disposition, defendants referred to a letter, attached to their motion, in which St. Paul identified itself as a surety and Skyline as the principal for the bond on the Selfridge project. As a matter of law, liability of the surety is coextensive with the liability of the principal in the bond. *In Re Mac Donald Estate*, 341 Mich 382, 387; 67 NW2d 227 (1954); *Will H. Hall & Son, Inc v Capitol Indem Corp*, 260 Mich App 222, 229; 677 NW2d 51 (2003). Therefore, the trial court erred in dismissing St. Paul pursuant to MCR 2.116(C)(10).

There is, however, a preliminary question of whether the trial court has jurisdiction over plaintiff's claim against St. Paul, which turns on whether the bond is governed by the Miller Act, 40 USC 270a *et seq.* or state law, MCL 129.201 *et seq.* A State court does not have jurisdiction of an action against a surety on a contractor's Miller Act payment bond. 40 USC 3133(b)(3)(B).

The trail court did not properly address this issue; it opined:

> There has been no articulation by either party whether this public project was pursuant to a state or federal contract. Since the project occurred on a federal air base, the Court infers this public project was subject to a federal contract. Accordingly, pursuant to the Miller Act, a federal contract for the "construction, alteration, repair of any public building or public work" in excess of $25,000 must be bonded. 42 USC § 270a(a).

Because the fact that the "project occurred on a federal air base" is not necessarily determinative of this issue, we remand this case to the trial court to make findings of fact and a proper determination of whether federal or state law applies to this bond. We note that if examination

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[1] Skyline also raises an issue regarding its counterclaim for fraud. But "[i]t is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

of the bond is required to determine this issue, Skyline and St. Paul, rather than Hayes, would be presumed to be in possession of the bond.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra